No.

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LORD ELECTRIC COMPANY, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the Court of Appeals erred in holding that a continuous course of bid-rigging pursuant to a single agreement may be divided into multiple antitrust prosecutions by an unprecedented inquiry into the "relevant market" in which each bid was rigged?

2. Whether the Court of Appeals erred in reversing the District Court's dismissal of the indictment on double jeopardy grounds by focusing solely on bidding conditions at particular projects rather than employing the "totality of the circumstances" test used in other circuits to determine whether all bid-rigging was pursuant to a single conspiracy?

3. Whether, on a nonfrivolous double jeopardy claim, the government must bear the burden of proving that the second indictment charges a separate conspiracy, and if so, whether the Court of Appeals erred in holding for the government on a finding that the defendants had failed to present "unambiguous evidence" of a single conspiracy?

4. Whether a court of appeals considering a dismissal on double jeopardy grounds is required to defer to the trial court's factual findings and its resolution of competing inferences unless such findings are clearly erroneous, and, if so, whether the Court of Appeals erred in reversing because it viewed the evidence as ambiguous or capable of supporting different inferences?

5. Whether the Court of Appeals' decision is in conflict with decisions in other Circuits, including *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982); and *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Lord Electric Company, Inc. ("Lord Electric")[1] asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on March 14, 1986.

Opinions Below

The opinion announcing the judgment of the Court of Appeals (Gibbons, J.), together with the concurring and dis-

1 Pursuant to Rule 28.1 of the Rules of this Court, Lord Electric represents that it has the following parent company and affiliates: LECO Enterprises, Inc., Lord International, Inc., Lord Corporation of Puerto Rico, Inc., Lord Electric Company of Puerto Rico, Inc., Halfhill Electrical Company, Ltd., Helmont Construction Company, Inc. and J.L. Murphy, Inc.

senting opinions (Stapleton, J. and Adams J., respectively), are reported at 785 F.2d 1123, and at pages 1a-35a of the Appendix to the Petition for a Writ of Certiorari of W.V. Pangborne and Co., Inc. ("Pangborne") and J.A. Bruce Pinney.[2] The order denying Petitioner's application for rehearing in banc by a 6-5 vote of the active Circuit Judges appears at page 60a of the Pangborne Appendix. The opinion of the United States District Court for the Eastern District of Pennsylvania, not officially reported, appears at pages 36a-55a of the Pangborne Appendix.

Jurisdiction

The judgment of the Court of Appeals reversing the District Court was entered on March 14, 1986. A timely petition for rehearing in banc was denied on April 18, 1986. Petitioner's timely motion for stay of the mandate pending determination of this Petition was granted on May 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C.§ 1291 and 18 U.S.C. § 3731.

Constitutional Provision and Statute Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or com-

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2 In addition to Pangborne and Pinney, Sargent Electric Company has also filed a petition for a writ of certiorari from the decision of the Third Circuit.

merce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

An indictment charging Petitioner with an antitrust conspiracy under Section 1 of the Sherman Act was dismissed by the District Court, following a full evidentiary hearing, on grounds that the prosecution would violate the Double Jeopardy Clause. In reversing, the panel majority (Adams, J., dissenting) created new rules for determining the scope of a per se unlawful antitrust conspiracy, rules which are irreconcilable with this Court's precedents, decisions of other Circuits, and Petitioner's rights under the Double Jeopardy Clause of the Constitution. Petitioner respectfully requests that the writ be granted to review the important questions raised by the Court of Appeals' decision.

I. Western Pennsylvania Conviction

Lord Electric was first indicted in July 1983 for violating Section 1 of the Sherman Act by conspiring to rig bids for electrical construction projects at the Western Pennsylvania Works of United States Steel ("USS") from the mid-1970's through 1981. Indicted with Lord Electric were Sargent Electric Company ("Sargent Electric") and Fischbach and Moore, Inc. ("Fischbach & Moore"). The indictment charged a single conspiracy to rig USS bids even though USS selected the companies that could bid on each project and even though bidders lists changed frequently throughout the period.

The jury found Lord Electric, Sargent Electric and Fischbach and Moore guilty as charged, and each was sentenced to the maximum penalty possible for an antitrust conspiracy, a fine of $1,000,000 plus the costs of prosecution. On appeal, the Court of Appeals for the Third Circuit held that the government had proven a single conspiracy as to all jobs, despite evidence of differences in the bidders lists for different pro-

jects. *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984). This Court denied all petition for writs of certiorari. ____ U.S. ____, 105 S.Ct. 1397 (1985).

II. Eastern Pennsylvania Indictment

In July 1984, four months after Lord Electric was sentenced, the company was again indicted under the Sherman Act for a conspiracy to rig bids on USS projects in Pennsylvania along with Sargent Electric and a Fischbach & Moore subsidiary, Pangborne. The "Offense Charged" was virtually identical to the previous indictment, changing only the name of the USS facility involved (the "Fairless Works" in Eastern Pennsylvania) and the place of the specific conspiratorial meetings on that facility (the Philadelphia Airport Motel "and other places").

A. *Proceedings in the District Court*

All defendants moved immediately to dismiss the Fairless Works indictment on the ground that the government had artificially divided a single antitrust conspiracy into separate prosecutions, in violation of the Double Jeopardy Clause.[3] The District Court held that the defendants' moving papers made a prima facie showing that the Fairless Works indictment placed them twice in jeopardy for the same offense. The government did not challenge this ruling on appeal. The Court accordingly ordered an evidentiary hearing.

After the hearing, the District Court found that the evidence was wholly inadequate to sustain the government's burden of proving, by a preponderance of the evidence, that the conspiracies charged in the successive indictments were separate

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3 The motions of Pangborne and Pinney were based on their previous conviction in *United States v. W.V. Pangborne & Co., Inc., et al.*, Cr. No. 84-105 (E.D. Pa.), for a conspiracy to rig bids for other electrical construction projects in the Philadelphia area. We respectfully refer the Court to the separate petition of Pangborne and Pinney for a statement of the facts regarding that previous conviction.

and independent. The proof showed instead that a common agreement existed among certain electrical contractors on USS and other projects in Pennsylvania to rig bids whenever they were invited to bid on the same projects. The Court's lengthy opinion thoroughly canvassed the evidence and made the following findings, *inter alia*:

> A "core group, made up of Sargent Electric, Lord Electric, Foley, Ortlip and Fischback [sic] and Moore with its subsidiary Pangborne, conspired together and with different sub groups to eliminate competitive bidding in each location at which members of the conspiracy bid" (50a).[4]
>
> "It is indisputable in this case that the time periods [of the bid rigging at each location] are basically congruent. . . . [I]t is clear that bid rigging was taking place at all facilities for a substantial part of the period between 1971 and 1981" (49a).
>
> "These contractors were competitors in that they were all available and capable of being added to the bid list of each facility. If they were added to the list, they would then be eligible to bid for jobs" (53a).
>
> "The parties' relationships at one facility depended upon their relationships at the others. If they could not work together and agree at one facility, they could not work together anywhere. . . . Although contracts were not allocated among the facilities, contractors cooperated at a facility to protect their position at the other facilities. . . . The companies agreed in one place so that they would be permitted to participate in another" (52a-53a).

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4 All appendix citations are to the Appendix in the petition of Pangborne and Pinney. "Foley," named in the quotation, is The Howard P. Foley Company, a co-defendant in the Western Works indictment which was not indicted in the present case because of a previous plea agreement with the government. "Ortlip" is the Harry F. Ortlip Company, which was not a defendant in the Western Works indictment.

On these and other carefully-detailed facts, the trial court concluded that

> "there was one general understanding among all the participating electrical contractors which had been in existence for a number of years that bids would be rigged when circumstances permitted regardless of whether the job was at U.S. Steel in Western Pennsylvania, Fairless Hills, Gulf Oil, Arco, Sun Oil or Lukens Steel" (55a).

Thus, because the bid rigging alleged in the present indictment was part of the same overall agreement to rig electrical construction bids for which the defendants had previously been tried, convicted and punished, the District Court dismissed the indictments.

B. ***The Court of Appeals' Decisions***

The Court of Appeals reversed in a 2-1 decision, each member of the majority writing separately and Judge Adams writing in dissent.

1. *Judge Gibbons' Opinion.* Judge Gibbons, announcing the judgment of the Court, held that the District Court committed "fundamental error" by "focusing on the common motive of fixing prices while disregarding the other essential element of a section 1 Sherman Act case, relevant market" (14a). Judge Gibbons neither cited any authority for this proposition nor explained fully how a "relevant market" is to be defined for purposes of per se antitrust violations under Section 1. However, his opinion applied his "relevant market" test to the facts of this case by ruling that a single conspiracy is impossible, as a matter of law, where (1) the contractors must be invited to bid by the customer soliciting bids, and (2) bid lists are not identical at the different facilities involved in the conspiracy.

Judge Gibbons' opinion seems to conclude that, every time an owner prepares a different bid list with different contractors, there is a separate indictable conspiracy in a separate

"relevant market"—even if the contractors are agreed, all along, that those who are invited to bid will rig the bidding.

2. *Judge Stapleton's Concurrence.* Judge Stapleton, concurring separately, employed a different analysis: evidence of the scope of a Section 1 conspiracy must be judged against certain presumptions based upon economic theory. Although Judge Stapleton did not identify the source of this theory, he described it as follows:

> "Experience teaches that one seeking to maximize his risk/benefit ratio will generally prefer to make ad hoc decisions that can take into account the facts of each situation bearing on benefit and risk unless there is some substantial benefit attainable from a broader commitment which is unobtainable through ad hoc decision-making" (16a-17a).

Applying this theory, Judge Stapleton reasoned that, notwithstanding the District Court's finding of a single agreement to rig bids whenever the composition of the bid list permitted, a rational actor would prefer to engage in site-by-site conspiracies. Because the contractors had not provided "unambiguous evidence of an overarching conspiracy" to overcome this presumption, and because the facts found by the District Court were "equally consistent with a finding of multiple conspiracies" (19a), Judge Stapleton held that the second indictment should stand. Furthermore, in evaluating the evidence, Judge Stapleton conducted a virtually *de novo* review of the facts, holding that the District Court's findings were erroneous where they conflicted with the conclusions Judge Stapleton drew from the testimony and other evidence (17a-20a).

3. *Judge Adams' Dissent.* In a vigorous dissent, Judge Adams argued that the majority's opinions had created new and ill-advised standards for double jeopardy claims in conspiracy prosecutions—standards in conflict with long-standing decisions of this Court as well as with the decisions of other

circuits. Judge Adams pointed out that Judge Gibbons' "relevant market" analysis has no place in a case alleging a per se violation of Section 1 of the Sherman Act, where "a demonstration of market power is deemed unnecessary" (25a n.2, *citing, inter alia, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)). Judge Adams also noted that the standard created by the majority would have far-reaching effects, as it would preclude any finding of a large-scale Section 1 conspiracy whenever even one of the participants was unable to bid at all locations (26a-27a).

Judge Adams also criticized the majority for substituting its own view of the evidence for that of the District Court (33a-34a). In usurping the District Court's role as the finder of fact, Judge Adams wrote, the majority had disregarded this Court's recent admonition that:

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

Anderson v. City of Bessemer City, ____ U.S. ____, 105 S.Ct. 1504, 1512 (1985), *cited at* 34a. Judge Adams further criticized Judge Stapleton's opinion for improperly placing the burden of proof on the defendants by requiring "unambiguous proof of an overarching conspiracy" to permit affirmance of the District Court's decision (19a). Judge Adams urged that the correct standard would require the government to bear the burden of proving separate conspiracies, once defendants had made out a nonfrivolous claim of double jeopardy (34a-35a).

Reasons for Granting the Writ

I. The Court of Appeals' "Relevant Market" Analysis, and Its Creation of Legal Presumptions Based on Speculative Economic Theories, Rewrite the Law on Conspiracies under Section 1 of the Sherman Act.

A. *The Decision Below Is in Conflict with Decisions of This Court*

The Third Circuit's introduction of a "relevant market" element into a per se case under Section 1 of the Sherman Act departs dramatically from this Court's prior decisions. By holding that the single, continuing agreement to rig bids found by the District Court could not establish a single conspiracy, the Court of Appeals has created confusion and uncertainty in a heretofore settled area of the law.

The Court of Appeals' mistake is far-reaching. The very reason for the per se rule is to avoid the necessity of measuring market impact for inherently anti-competitive activities such as price-fixing. As this Court has recently stated,

> "Horizontal price-fixing and output limitations are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high . . . . In such circumstances, a restraint is presumed unreasonable *without inquiry into the particular market context in which it is found*."

National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (emphasis added). If the Third Circuit's approach is permitted, the purpose of the per se rule will be devoured by prolonged argument over the market impact of alleged anticompetitive activity. The novelty of the Third Circuit's "relevant market" analysis is evident from the fact that not a single authority is cited in support.[5]

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5 The government did not argue below that the District Court's decision was flawed for failing to define a relevant market.

The Court of Appeals' approach creates a further anomaly. The majority holds that, because the conspirators' ability to rig bids was dependent on their being invited to bid, the bid lists on each project defined the relevant market and therefore the conspiracy (13a). But this is no different from saying that, without the power to assure the success of the conspiracy as to each project, the participants cannot have conspired.

Such a standard, again, rewrites the law of per se unlawful conspiracies, which at least since this Court's decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), has rejected any weighing of the probabilities of the success of the conspiracy. "It is the 'contract, combination . . . or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *Id.* at 225 n.59 (*quoting* Section 1 of the Sherman Act). Thus, an antitrust conspiracy may be established although no overt act is shown and although there is no evidence that "the conspirators had the means available for accomplishment of their objective." *Id.*

Similarly, the presumption created by Judge Stapleton's concurring opinion—namely, that conspirators do not engage in single, continuing conspiracies but instead in separate, ad-hoc acts of bid-rigging—replaces traditional analysis of Sherman Act conspiracies with speculative, *a priori* economic theorizing. Judge Stapleton cited no authority, either judicial or academic, for his theory favoring multiple rather than single antitrust conspiracies, and none exists. Moreover, the opinion's reliance on an economic theory describing the behavior of hypothetical rational actors introduces an unwarranted—and unprincipled—complexity into price-fixing cases. The nature of the illegal agreement properly depends upon the facts—not upon the application of "some *a priori* economic model." *Cf. Albrecht v. Herald Co.*, 390 U.S. 145, 152 n.8 (1968).

B. ***The Decision Below Is in Conflict with Decisions of Other Circuits***

Courts of appeals in other circuits have not hesitated to find single, large scale price-fixing conspiracies encompassing widely-scattered locations over lengthy periods, regardless of differences in the details of the price-fixing at different locations. *E.g., United States v. Beachner Construction Co, Inc.*, 729 F.2d 1278 (10th Cir. 1984); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982); *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978). Rather than focusing arbitrarily on the single factor of differences in bidders lists at different locations, these cases concentrate on whether a common agreement governed the conspirators' participation in bid-rigging at different times and at different locations, since "[t]he gist of the crime of conspiracy . . . is the agreement." *Braverman v. United States*, 317 U.S. 49, 53 (1942). Indeed, the use of a "relevant market" analysis (per Judge Gibbons) or a factual presumption of ad-hoc decision making (per Judge Stapleton) would have produced entirely different results in each of these cases.

For example, in *United States v. Beachner Const., supra*, the government had divided a 20-year, statewide scheme to rig highway construction projects into two indictments. In response to a double jeopardy claim, the government argued that there were separate conspiracies "[b]ecause each job could be rigged only after individual negotiations at the time of the letting" and "the participating contractors would not usually base their decision to 'go along' with the rigging on the reliance of a future 'favor' from another contractor." 729 F.2d at 1283. Further, the evidence established that, because of conditions in the industry and other factors beyond the control of the participants, the vast majority of all jobs could not be rigged in the later years of the alleged conspiracy. *Id.* at 1280. Nevertheless, the Tenth Circuit found a violation of the Double Jeopardy Clause in the improper division of a single con-

spiracy, as defined by "the common objective . . . shared by each participating contractor: *to eliminate price competition and ensure higher individual profits*." *Id.* at 1283 (emphasis original).

Similarly, in *United States v. David E. Thompson, Inc.*, *supra*, the jury's finding of a single bid-rigging conspiracy was upheld despite the fact that "changes in industry practices" prevented the conspirators from controlling the composition of the bid lists during a substantial portion of the period involved. 621 F.2d at 1149, 1151-52. And in *United States v. Portsmouth Paving Corp.*, *supra*, a single conspiracy finding was sustained even though different groups of bidders bid at different locations and "economic feasibility" would not have permitted one of the bidders to participate at other sites. 694 F.2d at 319.[6]

Accordingly, the Court should grant the writ because the Third Circuit's decision creates new antitrust standards in conflict with this Court's precedents, and to resolve the conflict between the Third Circuit's decision and those of other Circuits.

II. The Narrow "Relevant Market" Test Employed by the Court of Appeals Is in Conflict with the "Totality of the Circumstances" Test Used by Other Circuits to Determine Whether Successive Conspiracy Prosecutions Violate the Double Jeopardy Clause.

This Court has never ruled on whether a "totality of the circumstances" test should be used to evaluate a claim that successive conspiracy prosecutions violate the Double Jeopardy Clause. Nevertheless, almost every circuit has expressly held that such double jeopardy claims must be judged by a "totality of the circumstances" test, rather than by the "same evidence" test traditionally applied to double jeopardy claims under this Court's decision in *Blockburger v. United*

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6 Similarly, in *United States v. Consolidated Packaging*, *supra*, the Court ruled irrelevant the fact that various conspirators were not invited to bid by certain purchasers. 575 F.2d at 124.

States, 284 U.S. 299, 304 (1932).[7] This approach is the only sensible one, since application of the same-evidence test would permit the government to bring multiple prosecutions for different parts of a single conspiracy simply by alleging different overt acts in each indictment. Furthermore, the "same evidence" test ignores the unique nature of the crime of conspiracy: the scope of a conspiracy is determined by the scope of the agreement among the conspirators, not the separate actions taken pursuant to that agreement. *See generally* cases cited *supra* n.7.

The Third Circuit, however, has refrained from expressly adopting this "totality of the circumstances" test. *United States v. Felton*, 753 F.2d 276, 281 (3d Cir. 1985). Indeed, the Third Circuit panel in this case ignored the District Court's finding that consideration of all the circumstances demonstrated that a common agreement covered all locations. Instead, the Court of Appeals chose to focus on the particular circumstances of bid rigging at the locations named in the different indictments. Such an approach is fundamentally irreconcilable with the "totality of the circumstances" test and almost inevitably leads to a finding of separate conspiracies.

Moreover, the Third Circuit's approach is also fundamentally at odds with the test commonly employed to determine whether evidence in a given trial demonstrates the conspiracy

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7 *See United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985); *United States v. Beachner Construction*, *supra*; *United States v. Sinito*, 723 F.2d 1250, 1255-57 (6th Cir. 1983), *cert. denied*, ___ U.S. ___, 105 S. Ct. 86 (1984); *United States v. Sturman*, 679 F.2d 840, 843 (11th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *United States v. Booth*, 673 F.2d 27, 29 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980); *United States v. Marable*, 578 F.2d 151, 153-53 (5th Cir. 1978); *United States v. Mallah*, 503 F.2d 971, 976 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). *See also United States v. Bendis*, 681 F.2d 561, 564 (9th Cir. 1981), *cert. denied*, 459 U.S. 973 (1982) (applying a "factor analysis").

The Fourth Circuit has expressly reserved decision on whether a "totality of the circumstances" test should be applied in place of the "same evidence" test. *See United States v. Lurz*, 666 F.2d 69, 74 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982).

charged or different conspiracies. When that question is presented, the trier of fact must determine the scope of the agreement or agreements among the defendants by inferences drawn from "all the circumstances and the conduct of all the alleged participants."[8] Indeed, that was the approach employed by the Third Circuit in affirming Lord Electric's conviction for a single conspiracy in the Western Pennsylvania case. *United States v. Fischbach and Moore*, *supra*, 750 F.2d at 1189-90.[9] To use a totality of the circumstances test to define the scope of a conspiracy on direct appeal from a conviction and a different test to define the scope of a conspiracy on a double jeopardy claim violates principles of fundamental fairness.

Accordingly, this Court should grant the writ to determine whether successive conspiracy prosecutions should be judged by a totality of the circumstances test for purposes of the Double Jeopardy Clause.

III. This Court Should Grant the Writ to Determine A Defendant's Procedural Rights on a Pre-trial Claim of Double Jeopardy.

A. *Burden of Proof*

In *Abney v. United States*, 431 U.S. 651 (1977), this Court held that denial of a pre-trial motion to dismiss an indictment on grounds of double jeopardy was immediately appealable under the collateral-order rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But this Court has never ruled on the procedural standards that should govern the hearing and determination of such a pre-trial motion, an issue on which the Circuits are divided. In the First, Second, Fifth

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8 *See, e.g.*, Federal Criminal Jury Instructions of the Seventh Circuit, § 5.11, "Conspiracy," at 74 (1980).

9 The Court of Appeals specifically relied upon this Court's decision in *United States v. Socony-Vacuum Oil Co.*, *supra*, for the proposition that a single conspiracy may be found even when the conspirators were unable to rig all of the bids that were allegedly included in the conspiracy. 750 F.2d at 1189.

and Sixth Circuits, when a defendant makes out a non-frivolous claim of double jeopardy, the burden shifts to the government to prove by a preponderance of the evidence that the second indictment charges a different crime. *See United States v. Booth*, *supra*, 673 F.2d at 30-31; *United States v. Mallah*, *supra*, 503 F.2d at 986; *United States v. Stricklin*, 591 F.2d 1112, 1124 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979); *United States v. Sinito*, *supra*, 723 F.2d at 1262-1263. The Seventh and Tenth Circuits, however, have held that the burden of persuasion remains at all times on the defendant. *See United States v. Castro*, *supra*, 629 F.2d at 461; *United States v. Beachner Const.*, *supra*, 729 F.2d at 1283-84 n.10; *United States v. Martinez*, 562 F.2d 633, 638 (10th Cir. 1977).[10]

In this case, Judge Gibbons' opinion acknowledged that the Third Circuit has in the past required the government to bear the burden of persuasion,[11] but nevertheless joined in Judge Stapleton's analysis which found for the government because the *defendants* had not provided "unambiguous evidence of an overarching conspiracy" (14a n.3; 19a). Judge Adams, in dissent, criticized the majority for placing the burden of proof on the defendants (33a-34a). This Court should grant the writ to resolve the split in the circuits on this issue.

B. ***Standard of Review***

The majority's opinions also raise the question whether appellate courts are required to defer to the trial court's findings of fact on whether the government has established that the conspiracy charged in the second indictment is separate from that charged in the earlier indictment. Here, as Judge Adams' dissent points out, the majority frankly ignored the

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10 The Ninth Circuit has taken still a different position, holding that a defendant's prima facie showing of a double jeopardy violation shifts the burden of coming forward with evidence, but not necessarily the burden of persuasion, to the government. *United States v. Bendis*, *supra*, 681 F.2d at 564.

11 *See United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977).

District Court's findings where they conflicted with the majority's view of the evidence (32a-34a). Judge Adams also pointed out that, since the District Court's findings were based on a lengthy evidentiary hearing at which witnesses testified, the majority's de novo review was in conflict with this Court's recent decision in *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1512 (1985), which held:

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

This Court should grant the writ to determine whether the admonition in *Anderson*, *supra*, applies to a district court's findings on a claim of double jeopardy.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

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Nos. 85-1936, 85-1942, and 85-1950

In the Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

LORD ELECTRIC COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

W.V. PANGBORNE AND CO., INC., AND
J.A. BRUCE PINNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

SARGENT ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that, on the facts as found by the district court, the conspiracy charged in the indictment was not part of a larger conspiracy for which petitioners had been previously placed in jeopardy.

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In the Supreme Court of the United States

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No. 85-1936

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (85-1942 Pet. App. 1a-35a) is reported at 785 F.2d 1123. The opin-

ion of the district court (85-1942 Pet. App. 36a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1986. Petitions for rehearing were denied on April 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 19, 1984, a grand jury in the Eastern District of Pennsylvania indicted petitioners Sargent Electric Company (Sargent), Lord Electric Company, Inc. (Lord), W.V. Pangborne and Co., Inc. (Pangborne), and J.A. Bruce Pinney, Pangborne's Executive Vice-President, for violating Section 1 of the Sherman Act, 15 U.S.C. 1. The district court dismissed the indictment, holding that the conspiracy charged was part of a larger conspiracy for which petitioners had previously been convicted and that the indictment was thus barred by the Double Jeopardy Clause. The court of appeals reversed. 85-1942 Pet. App. 2a-3a.

1. The indictment charged the petitioners with conspiring to rig bids on electrical construction projects at United States Steel Corporation's Fairless Hills plant in Bucks County, Pennsylvania (Fairless). Petitioners Sargent and Lord claimed that the conspiracy was part of a larger conspiracy that included rigging bids at United States Steel facilities in Western Pennsylvania (Western Pennsylvania Works) for which they previously had been convicted. Petitioners Pangborne and Pinney claimed that the Fairless conspiracy was part of a larger conspiracy that included bid rigging at Gulf Oil Company in

Philadelphia (Gulf) to which they had pleaded nolo contendere. 85-1942 Pet. App. 3a-4a.

The district court held that there had been a single conspiracy to rig bids, which encompassed bid rigging not only at Gulf, Fairless, and the Western Pennsylvania Works, but also at Lukens Steel in Coatesville, Pennsylvania, the Atlantic Richfield Refinery in Philadelphia, and the Sun Oil Company in Marcus Hook, Pennsylvania. The court acknowledged that the bid-rigging activities at these separate locations involved significantly different companies and individuals (85-1942 Pet. App. 41a-43a);[1] that the activities at the separate locations began and ended at different times and for different reasons (*id.* at 39a, 43a); that for each location there were separate bid-rigging meetings (*id.* at 39a-40a, 54a); and that for each location there was a separate system for allocating work (*id.* at 40a). Thus, although the conspirators tried to allocate the work evenly among themselves at each location, jobs were never traded off between Fairless and any other facility, even when the same companies bid at more than one location (*ibid.*). The district court also acknowledged that some of the companies it considered major participants in a broad conspiracy were actually bidding competitively at some of the locations encompassed in the supposed broad conspiracy (*id.* at 43a-44a, 53a).

Despite these facts, the district court found the existence of a single conspiracy to rig bids "wherever and whenever possible" (85-1942 Pet. App. 55a). The court relied on the participation of some of the

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[1] At each of these locations the company soliciting bids for electrical construction work had a list of invited bidders, and a company could not bid unless it was on the bid list for that project (85-1942 Pet. App. 37a-38a).

conspirators in several schemes[2] and the common objective of all schemes, *i.e.*, to rig bids (*id.* at 49a-50a, 52a).

2. On appeal, none of the petitioners attempted to defend the district court's conclusion that there was a single conspiracy that linked Western Pennsylvania, Gulf, and Fairless. Each petitioner tried to tie the Fairless conspiracy to the particular conspiracy for which it had previously been prosecuted—*either* Western Pennsylvania *or* Gulf—but none seriously argued that there was a conspiracy that linked Western Pennsylvania *and* Gulf.[3]

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[2] No company or individual participated at every location (see 85-1942 Pet. App. 41a-43a). Although the district court's chart (*id.* at 42a, 43a) shows one company, Foley, as a "participant" at all locations, that is apparently a typographical error, for the district court found that Foley did not rig bids at Lukens Steel (*id.* at 44a, 51a-52a).

[3] See court of appeals briefs: Lord Br. 4 n.5; Sargent Br. 10-11; Pangborne Br. 6 n.5.; Pinney Br. 4 n.4; see also 85-1942 Pet. 10-11 (continuing to argue for a "Philadelphia area" conspiracy); 85-1950 Pet. 3 (emphasis added) (claiming district court found "one conspiracy to rig bids for all electrical construction projects *at United States Steel Corporation*, regardless of the location of the project"). Indeed, the record forcefully negates any link between Gulf and Western Pennsylvania. Not a single individual was common to both schemes. And, although the Howard P. Foley Company participated in both conspiracies, Foley's representative in the Gulf bid rigging, Herbert Geuther, was not even aware that bid rigging was occurring at the Western Pennsylvania Works. C.A. App. 627. Even Paul Arbogast, the officer who led Lord's bid rigging, testified in the district court that, in his view, the bid-rigging conspiracy encompassed only U.S. Steel Corporation jobs (*i.e.*, Fairless and the Western Pennsylvania Works); he did not place any other "Philadelphia area" sites in this conspiracy. 85-1942 Pet. App. 19a n.8.

The court of appeals reversed by a 2-1 vote, with each judge writing separately. Judge Gibbons "accept[ed] as true the underlying facts" as found by the district court (85-1942 Pet. App. 14a). He determined, however, that the district court's conclusion that there was a single conspiracy was either a finding of fact that was inconsistent with the historical and narrative facts and thus clearly erroneous, or an erroneous conclusion of law (*id.* at 14a-16a & n.3). Judge Gibbons also analyzed the relevant market in light of the district court's factual findings and concluded that the participants in the broad conspiracy defined by the district court were not competitors or potential competitors of each other at many of the locations encompassed in that conspiracy. In these circumstances, Judge Gibbons believed that the existence of a single overarching conspiracy could not be inferred from the circumstantial evidence in this case (*id.* at 7a-8a, 15a).

Judge Stapleton also accepted the underlying findings of the district court and concluded that the evidence compelled the conclusion that defendants had engaged in site-by-site bid rigging rather than a single overarching conspiracy (85-1942 Pet. App. 17a-19a, 20a-21a).[4]

Judge Adams dissented, concluding that, although "the record might support an inference that multiple conspiracies existed" (85-1942 Pet. App. 34a), the district court's finding of a single conspiracy was not clearly erroneous.

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[4] Judge Gibbons specifically joined in Judge Stapleton's analysis of "the absence of evidence which could justify a finding of a single overreaching [*sic*] conspiracy." 85-1942 Pet. App. 14a n.3.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Although petitioners attempt to convert statements by individual judges of the court of appeals into legal holdings with far-reaching implications, the only question truly presented by this case—and the question treated as decisive by each of the three judges—is whether, under all the circumstances, the Fairless conspiracy was part of an overarching conspiracy for which petitioners had previously been placed in jeopardy. The answer to that question depends, of course, on the unique facts of this case. See *Blumenthal* v. *United States*, 332 U.S. 539, 553-559 (1947). The majority of the court of appeals, accepting findings of underlying fact made by the district court, correctly determined that the district court's inference of a single overarching conspiracy was clearly erroneous.

1. Both Judge Gibbons and Judge Stapleton recited in detail the facts, either undisputed or specifically found by the district court, that compelled the conclusion that there were separate conspiracies. As Judge Gibbons observed (85-1942 Pet. App. 15a):

> The district court found that at each facility there were separate bid lists; that the purchasers, not the bid-riggers, controlled access to those bid lists; that the membership of different lists was not identical; that some firms qualified to bid at more than one facility did not rig bids at all of them; that separate bid-rigging meetings were held with respect to each facility; that the allocation of business among the bid-riggers was made on a facility-by-facility basis; that not all the conspiring personnel knew each other; that

> the bid-rigging commenced at each facility at different times; and that bid-rigging ended at each facility at different times and for different reasons.

Judge Stapleton noted (85-1942 Pet. App. 17a-19a (footnotes omitted)):

> The trial court found or the undisputed evidence demonstrated (1) that there was a different group of bidders at each site; (2) that separate bid rigging meetings were held, and separate records maintained, for each site; (3) that precautions taken against discovery varied; (4) that the allocation of business at Western [Pennsylvania] Works, Fairless, Gulf and virtually all other sites was made exclusively on a site-by-site basis despite the feasibility of trade-offs between sites as demonstrated by those which occurred between Western [Pennsylvania] Works and Jones & Laughlin Steel; (5) that the method for designating the low bidder varied; (6) that some firms qualified to bid at more than one site did not rig bids at all of them; (7) that not all of the conspiring personnel knew one another; (8) that several of the purported "core" conspirators did not know that bid rigging was going on elsewhere than at their particular location; (9) that the bid rigging commenced at each site at a different time; and (10) that the bid rigging ended at each facility at different times and for different reasons.[5]

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[5] Immediately after setting forth these extensive, undisputed facts, each judge noted that the recited facts compelled a conclusion that there were multiple conspiracies in the absence of "others pointing the other way" (85-1492 Pet. App. 15a) or "unambiguous evidence suggesting an overarching conspiracy" (*id.* at 19a). Taking this latter phrase out of context, Lord and Pangborne assert that the court of appeals im-

Petitioners cite other cases involving some of these factors, but they point to no case in which a finding of a single conspiracy has been allowed to stand in the face of all (or nearly all) of these factors demonstrating the existence of multiple conspiracies (see 85-1936 Pet. 11-12; 85-1942 Pet. 13-15; 85-1950 Pet. 11-12). In *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), the "single conspiracy" found was one in which, for 25 years, the conspirators rigged bids submitted to a single customer, the Kansas Department of Transportation. Obviously, that case did not involve facts, like those recited above, indicating the existence of overlapping but distinct conspiracies involving different customers and facilities. The argument that the court rejected in *Beachner* was that there was a separate conspiracy each time the Kansas Department of Transportation let new bids (729 F.2d at 1283). That argument was not made in this case and is not the basis of the decision of the court of appeals (see pp. 18-19, *infra*).

In *United States* v. *David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980), there is no indication in the court's opinion that the bid riggers' work allocations were separate for each customer or that par-

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properly placed the burden of proof on defendants (85-1936 Pet. 14-15; 85-1942 Pet. 9 n.2). The assertion is wholly without merit. The recited facts showed that the government had amply met its burden of proof, and Judge Stapleton remarked only on what it would have taken, in the face of the government's evidence, to support the district court's contrary conclusion. Moreover, by placing the burden of proof on the government (see 85-1942 Pet. App. 4a (citing *United States* v. *Inmon*, 568 F.2d 326, 331-332 (3d Cir. 1977))), the Third Circuit was actually more generous to petitioners than some other circuits (see 85-1936 Pet. 15).

ticipants in the conspiracy were simultaneously rigging bids for one customer's jobs and bidding competitively for other customers' jobs, as in this case. Indeed, the argument that separate customers or facilities were the objects of separate conspiracies was not even made; the argument the court rejected was that the original conspiracy died in 1970 and a new one began in 1972 with the same core participants but some shifts in membership. 621 F.2d at 1151-1152. As in *Beachner*, the court also rejected "appellant's claim that each incident of bid rigging was approached on an isolated, *ad hoc* basis" (*id.* at 1152).

Finally, in *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978), the existence of a nationwide conspiracy was conceded, and Consolidated's argument was that it was not part of that conspiracy. The case stands for the proposition that one may join a conspiracy without knowing all its members or participating in every price-fixing incident; the case says nothing about what facts indicate a single conspiracy and what facts indicate multiple conspiracies.[6]

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[6] Lord alone (85-1936 Pet. 11, 12) relies on *United States* v. *Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982). In that case, the defendant claimed that "economic feasibility would not allow [it] to bid on contracts originating in Virginia Beach," but the evidence showed that it *had* "agreed to the allocation of contracts and the rigging of bids with companies based in Norfolk and Virginia Beach" (694 F.2d at 319). Moreover, illegal territorial allocation was part of the conspiracy alleged and proved in that case (*ibid.*), and a conspiracy to allocate territories obviously must be treated as one conspiracy, not a separate conspiracy in each territory. And again, the case did not involve critical factors present in this case, such as the absence of tradeoffs between

In sum, the decision below turns on the unique facts of this case and does not conflict with any decision of another court of appeals. Judges Gibbons and Stapleton reached the ultimate issue by somewhat different paths, but both concluded that the undisputed facts, and the facts found by the district court, required a determination that there were multiple conspiracies. That determination does not warrant review by this Court.

2. a. Petitioners claim that the Court should grant certiorari to review a conflict in the circuits as to the application of the "totality of the circumstances" and "same evidence" tests (85-1936 Pet. 12-14; 85-1950 Pet. 9-11). However, even though the Third Circuit has not expressly adopted the "totality of the circumstances test" used in other circuits, Judges Gibbons and Stapleton each examined the totality of the facts in detail; neither relied on the mere fact that the allegations of the indictment could not be proved using the "same evidence" as would prove the allegations of the previous indictments (see, *e.g.*, 85-1942 Pet. App. 10a-14a, 17a-20a).

Indeed, Judge Adams recognized in his dissent (85-1942 Pet. App. 31a) that in practice the Third Circuit has followed the other circuits in employing the totality-of-the-circumstances approach, although it has not expressly adopted it. Thus there is no conflict in the circuits for the Court to resolve.[7]

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different locations and the simultaneous participation of some conspirators in schemes at one place and nonparticipation by the same parties in schemes at other places.

[7] Sargent appears to acknowledge that the courts of appeals are in agreement in following the totality-of-the-circumstances approach and that the approach is correct. Sargent nonethe-

b. Petitioners claim (85-1936 Pet. 15-16; 85-1942 Pet. 10-11) that the decision of the court of appeals conflicts with *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985). Unlike the lower court in *Bessemer City*, however, the court here did not undertake a de novo review of the record, reweigh the credibility of witnesses, or displace the district court's findings with its own assessment of the facts. *Bessemer City*, slip op. 11, 12.[8] Indeed, Judges Gibbons and Stapleton expressly accepted the district court's findings of historical and narrative fact (85-1942 Pet. App. 15a, 19a). As Judge Gibbons put it, those "historical or narrative facts found by the district court require a holding that the United States established, as a matter of law, that the bid-rigging at the different facilities constituted multiple Sherman Act offenses" (*id.* at 15a).

All that the majority of the court of appeals rejected were the district court's speculative "explanations" and conclusions, which the historical and narrative facts either failed to support or flatly contradicted. For example, Judge Gibbons noted (85-1942 Pet. App. 13a) that, "[w]hile observing that '[t]he parties' relationships at one facility depended upon their relationship at the others,' the district court discounted the undisputed fact that The Foley Co. did

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less asks this Court to grant certiorari because *it* has never adopted this standard (85-1950 Pet. 10-11). Since Sargent does not point to a misapplication of this Court's standards or any claimed conflict in the standards adopted by the circuits, Sargent's plea for the Court to set a standard should be rejected.

[8] Judge Gibbons explicitly recognized that the court was not free to "select among competing permissible inferences" from the factual record (85-1942 Pet. App. 6a).

not rig bids at Western Works or at Lukens Steel while it participated in bid-rigging at [Gulf and Fairless]."[9] Similarly, the majority credited the district court's factual conclusion that the separate schemes began and ended at different times and for different reasons. What the majority did not accept was the district court's "explanation" that the inference of separate conspiracies was negated because the schemes ended for reasons that were beyond the conspirators' control. As Judge Gibbons noted, the very absence of control (and the fact that each scheme was able to succeed independent of any other) is "strong evidence of the absence of interdependence among the separate markets and thus undercuts the [district] court's ultimate conclusion that the participants acted pursuant to a single overarching conspiracy" (85-1942 Pet. App. 14a). The majority also concluded that the district court had unduly emphasized that each scheme had the "common objective" (*id.* at 52a) of price fixing,[10] while discounting most of its other findings that negated the exist-

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[9] See also 85-1942 Pet. 11 & n.4 (relying on the same faulty premise as the district court). Pangborne also claims that a single conspiracy should be inferred because four contractors "did most of the bidding" at Arco, Gulf, Sun, Lukens, and Fairless (but not the Western Pennsylvania Works) (*id.* at 10). But one of those four contractors was Foley, which was bidding competitively at Lukens at the same time it was rigging bids at other facilities. Thus, the behavior of those four contractors was more consistent with the hypothesis of separate, facility-by-facility conspiracies than with the hypothesis of interdependent schemes at the different facilities.

[10] If a "price fixing" objective were sufficient to link conspiracies involving different participants, times, locations, and activities, then most Sherman Act indictments in the country would be part of a single conspiracy.

ence of a common scheme, *e.g.*, the differences in meeting places, the differences in the manner in which bids were submitted, the differences in time periods, and the fact that some so-called "core conspirators" (85-1942 Pet. App. 50a) were *not* rigging bids everywhere they could (*id.* at 13a, 17a-19a).[11]

This Court observed in *Bessemer City* that " 'a [factual] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been made.' " Slip op. 8 (emphasis added) (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The majority followed that principle in concluding that, in light of the entire record, the facts found by the district court could not as a matter of law establish a single conspiracy (85-1942 Pet. App. 15a, 20a-21a). That conclusion does not warrant further review.

3. a. Petitioners contend that Judge Gibbons' statements about "relevant markets" (85-1942 Pet. App. 7a-8a) conflict with prior decisions of this Court and other courts of appeals that hold that proof of the relevant market is not an essential element of a per se Sherman Act violation (85-1936 Pet. 9-12; 85-1942 Pet. 7-9; 85-1950 Pet.

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[11] Both Lord and the Foley Company were bidding competitively at Lukens (85-1942 Pet. App. 13a, 33a, 42a, 51a-52a). Foley also discontinued its participation in the Western Pennsylvania Works conspiracy while continuing to rig bids at Fairless and other places (*id.* at 43a, 53a). And another so-called "core conspirator," the Ortlip Company, did not rig bids at the Western Pennsylvania Works because Ortlip was "distrust[ed]" by the Western Pennsylvania Works conspirators (*id.* at 50a).

6-9).[12] But dicta in the opinion of a single judge do not merit this Court's review. "This Court * * * reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). And, although Judge Gibbons used the phrase "relevant markets" imprecisely, his remarks about "relevant markets" do not undermine his conclusion that the evidence as a whole showed multiple conspiracies.

Judge Gibbons concluded that one of the circumstances relevant to determining whether there was one conspiracy or several was whether the conspirators focused on one large "market" or several distinct "markets." This was not error.[13] To the contrary,

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[12] Sargent states that "it is undisputed that persons accused of conspiracy under Section 1 of the Sherman Act must be actual or potential competitors" and that "the terms 'relevant market' and 'competitors' may at first blush seem to be identical,' " but Sargent quarrels with the "narrow" way in which Judge Gibbons "defined" relevant market (85-1950 Pet. 7). Sargent then offers a "hypothetical" to show why Judge Gibbons' market definition could be incorrect in some cases (*id.* at 8). But that hypothetical is not this case; and, as noted at pp. 6-7, *supra*, Judge Gibbons relied on considerably more than the proposition that a contractor not on a bid list is not a "potential competitor."

[13] Judge Gibbons did not, as petitioners imply, state that proof of a relevant market is essential in all Section 1 cases; no such question was presented in this case. Judge Gibbons expressly acknowledged that proof of a relevant market is not essential to prove a violation when evidence of a horizontal agreement exists: that evidence, of itself, "tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very existence supports an inference that it would have an effect in a relevant market." 85-1942 Pet. App. 7a-8a; accord,

applying the "totality of the circumstances" approach to determine whether the district court properly inferred the existence of a single large conspiracy from the circumstantial evidence in this record, Judge Gibbons correctly stated that companies that are not actual or potential competitors have little incentive to agree to rig bids because "there would be no point to such an agreement." 85-1942 Pet. App. 7a.[14] A pattern of bid rigging is less likely to be part of a single conspiracy when, as in this case, the participants in the alleged single conspiracy are not actual or potential competitors with respect to many of the contracts that are rigged.[15]

Neumann v. *Reinforced Earth Co.*, 786 F.2d 424, 428 (D.C. Cir. 1986) (Bork, J.); see also *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 12 (quoting *NCAA* v. *Board of Regents*, 468 U.S. 85, 109-110 (1984) ("absence of proof of market power does not justify a naked restriction on price or output")). The issue in this case, however, is not whether there was an agreement but instead what the scope of the agreement or agreements was (see 85-1942 Pet. App. 8a).

[14] As Judge Adams acknowledged in his dissent (85-1942 Pet. App. 25a), "it seems unlikely that a situation would actually arise in which two conspirators that are truly not in competition would agree to engage in an anticompetitive practice when that agreement could in no way benefit either conspirator."

[15] Pangborne argues (85-1942 Pet. 11) that "the Court of Appeals" (*i.e.*, Judge Gibbons) erred in concluding that the participants in the district court's conspiracy are not potential competitors, claiming that "all the defendants competed for jobs in the Philadelphia area." But the district court found that there was a conspiracy encompassing more than the "Philadelphia area" (see note 3, *supra*). According to the district court, the conspiracy encompassed bid rigging in Western Pennsylvania and "wherever * * * possible" (85-1942

Other courts have similarly relied on market factors to determine the scope of a Sherman Act conspiracy. In *United States* v. *Korfant*, 771 F.2d 660 (2d Cir. 1985), the defendants had claimed that their conspiracy to fix poultry prices in New England was part of a conspiracy to fix poultry prices in Ohio. The court noted that, even "[a]ssuming that First National did establish and attempt to execute an overall plan to fix prices in each of its regional markets, success in each depended upon its ability to achieve agreements with two distinct sets of competitors and upon the response of two distinct consumer markets to the implementation of such agreements. Such functional independence reflects two conspiracies, not one." 771 F.2d at 663. *Korfant* thus lends strong support to the decision of the court of appeals

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Pet. App. 55a). Moreover, even in the localities encompassed in the "Philadelphia area," neither the defendants, nor most of the other participants in the broad conspiracy perceived by the district court, actually or potentially competed. The only place in which all four defendants actually competed was Fairless, the site that is the subject of this indictment. Nor were all the various contractors from Western Pennsylvania to Philadelphia to Coatesville even "potential" competitors of each other. As the district court acknowledged (85-1942 Pet. App. 37a), at least some of the victims of the various bid-rigging schemes wanted contractors in their immediate local area to perform their work, and U.S. Steel particularly wanted contractors with steel mill experience (see also C.A. App. 325, 335). Thus, even though some companies were potential competitors at some sites because they met the customer's qualifications and might be added to a bid list on a future project (cf. 85-1942 Pet. 11), most companies included in the broad conspiracy perceived by the district court (*e.g.*, Henckels & McCoy at Lukens, Progressive at Sun Oil, Riggs-Distler at Arco, or Meade, Tico, and Fuellgraf in Western Pennsylvania) could never have qualified at most of the sites included in that conspiracy.

in this case. Cf. 85-1950 Pet. 11-12. In *United States* v. *Ashland-Warren, Inc.*, 537 F. Supp. 433 (M.D. Tenn. 1982), the court rejected defendants' claim that bid-rigging conspiracies on road-paving contracts in Tennessee and Virginia were related, reasoning in part that the contractors in Tennessee and Virginia were, for the most part, not even potential competitors of each other. 537 F. Supp. at 446. The court's analysis was similar to that employed by Judge Gibbons in this case.

Whatever its defects might be in other contexts, Judge Gibbons' approach of defining a "relevant market" is pertinent in determining the scope—as opposed to the existence—of a price-fixing conspiracy. In addition, Judge Gibbons relied on a number of factors, not tied to his "market" analysis, in determining that there were multiple conspiracies rather than one (see pp. 6-7, *supra*). Therefore, Judge Gibbons' analysis of the district court's factual findings does not present an issue warranting review by this Court.

b. Just as petitioners challenge certain statements in Judge Gibbons' opinion that were not joined by Judge Stapleton and are inessential to the court's holding, so too Lord criticizes a portion of Judge Stapleton's concurrence as "replac[ing] traditional analysis of Sherman Act conspiracies with speculative, *a priori* economic theorizing" (85-1936 Pet. 10). Judge Stapleton's observations do not warrant review. Judge Stapleton considered whether the conspirators were likely to engage in site-by-site or broad-ranging bid-rigging agreements (see 85-1942 Pet. App. 16a-17a). Judge Stapleton reviewed the evidence as a whole and concluded, first, that the record was barren of evidence as to why the conspirators would have engaged in a single broad-ranging con-

spiracy. Judge Stapleton was surely entitled to rely on "common sense and economic theory" in assessing the evidence (see *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 8-9), and there is nothing wrong with demanding evidence of motive before accepting a factual finding that economic actors behaved in a way contrary to common sense and economic theory. Viewing the evidence in its entirety, Judge Stapleton also concluded that "all of the circumstantial evidence either strongly favors or is consistent with a finding of multiple conspiracies." 85-1942 Pet. App. 17a.

c. Lord interprets Judge Gibbons' opinion to "hold[] that * * * the bid lists on each project defined the relevant market and therefore the conspiracy" (85-1936 Pet. 10; see also 85-1942 Pet. 10-11). This "holding," petitioners claim, conflicts with other decisions that have found a single conspiracy notwithstanding the existence of different bidders on different projects (85-1936 Pet. 11-12; 85-1942 Pet. 13-15). Judge Gibbons, however, did not define the conspiracies in the way petitioners claim. What Judge Gibbons stressed in his "market" analysis was that most contractors were not "qualified" and could not get on the bidders' lists at all locations (85-1942 Pet. App. 12a) and thus were not even "potential" competitors of the others bidding at those sites.

The clearly established law in the Third Circuit is that a single conspiracy may encompass bid riggers who do not all appear on a single bidders' list. *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (1984) (single conspiracy existed to rig bids at the Western Pennsylvania Works, despite changes in the bidders' lists from project to project), cert. denied, No. 84-1203 (Mar. 4, 1985) and No. 84-1331 (Mar.

25, 1985). Judge Gibbons took special note of *Fischbach & Moore* but expressed no disagreement with that decision (85-1942 Pet. App. 8a-9a).[16]

The decision of the court of appeals represents a holding, based on the totality of the circumstances and the entire record, that there were separate conspiracies at the Western Pennsylvania Works, at Gulf, and at Fairless. It does not overturn the prior holding of the court of appeals in *Fischbach & Moore* that a single conspiracy may involve several distinct bidders' lists. The "holding" that petitioners ask this Court to review simply does not exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1986

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[16] Judge Adams, in dissent, did not suggest that Judge Gibbons' approach was inconsistent with *Fischbach & Moore*, and Chief Judge Aldisert, the author of *Fischbach & Moore*, apparently did not perceive the decision in this case as inconsistent with *Fischbach & Moore*, for he voted to deny rehearing en banc (85-1942 Pet. App. 58a-65a).

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